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CALIFORNIA VALLEY MIWOK TRIBE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

THE CALIFORNIA GAMBLING CONTROL  
COMMISSION,

Defendant.

Case No.: 08 CV 0120 BEN AJB

**PLAINTIFF'S REPLY TO DEFENDANT'S  
OPPOSITION TO PLAINTIFF'S MOTION  
TO REMAND**

Date: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: Hon. Roger J. Benitez

Plaintiff California Valley Miwok Tribe ("Miwok Tribe" or "the Tribe") submits the following in reply to Defendant California Gambling Control Commission's ("the Commission") opposition to Plaintiff's Motion to Remand Back to State Court.

**I.**

**PLAINTIFF INCORPORATES BY REFERENCE  
ITS OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The Commission filed a motion to dismiss Plaintiff's Complaint under Rule 12(b)(1), (6), and (7), which is set to be heard on the same day of Plaintiff's Motion to Remand Back to State Court. Plaintiff has filed an extensive opposition to that motion, which addresses the same issues raised in the Commission's opposition to Plaintiff's Motion to Remand.

**PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION**

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Accordingly, for the sake of judicial economy, Plaintiff incorporates by reference those points and authorities into its reply to the Commission's opposition to Plaintiff's Motion to Remand.

## II.

### **PLAINTIFF ONLY SEEKS EQUITABLE RELIEF, INCLUDING A JUDICIAL DETERMINATION ON THE COMMISSION'S DUTY TO DISTRIBUTE REVENUE SHARING TRUST FUND MONEY UNDER STATE LAW**

#### A. Plaintiff does not ask the Court to enforce the Compact

The Commission has completely mischaracterized the Plaintiff's Complaint.

For example, the Commission argues that this Court has subject matter jurisdiction, because Plaintiff's suit purportedly seeks to enforce the terms of the Compact. (Defendant's P/A's, pg. 3, lines 20-26). This contention is meritless.

As stated, Plaintiff has withdrawn its Third Party Beneficiary "Breach of Contract" cause of action. Thus, the only claims Plaintiff makes are equitable in nature. Specifically, the Complaint asks the Court (i.e., the State Court) to make a judicial determination of the Commission's duty to distribute Revenue Sharing Trust Fund ("RSTF") money under a specific State statute regulating the Commission's duties with respect to these funds. That State statute is Cal. Gov. Code Section 12012.75, which specifically provides in relevant part as follows:

...Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available to the California Gambling Control Commission, upon appropriation by the Legislature, for the purpose of making distributions to noncompact tribes, in accordance with distribution plans specified in tribal-state gaming compacts. (Emphasis added).

This is the statute that governs the Commission's duties. There is no federal statute that preempts Cal. Gov. Code Section 12012.75. The fact that this statute directs that the Commission's duty to distribute be "in accordance with" what is set forth in the Compact, does not make it a federal question. Neither does it make Plaintiff's suit for declaratory relief as to

1 the Commission's duty an action to enforce the Compact. Moreover, the RSTF money at issue  
2 comes from the State Treasury, not from the federal treasury or any arm of the federal  
3 government.

4 In Cates v. California Gambling Control Commission (2007) 154 CA4th 1302, Plaintiff  
5 brought a taxpayer action against the Commission, and others, seeking declaratory relief as to  
6 the Commission's duty to collect money the Compact-Tribes were supposed to be paying into  
7 the Special Distribution Fund ("SDF"). Plaintiff alleged that the Tribes were paying into the  
8 SDF their share of gambling winnings according to their own definition of "net win", and not  
9 according to the "net win" definition in the Compact. There was no federal question in Cates,  
10 simply because the Commission's duty to collect unpaid SDF money was defined, in part, by  
11 reference to the Compact (i.e., the definition of "net win"). Plaintiff's counsel in the Cates case  
12 was the same counsel as in this (Miwok) case.

13 Neither the State Superior Court nor the State Court of Appeal in Cates had any  
14 difficulty rendering a decision as to the Commission's duties under State law, because of  
15 reference to the Compact with respect to some of the Commission's duties. For the same  
16 reason, Cal. Gov. Code Section 12012.75's reference to the Compact (i.e., Section 4.3.2.1) to  
17 define the Commission's duties in distributing RSTF money does not create federal law. The  
18 source of the Commission's duties remains as Cal. Gov. Code Section 12012.75.

19 Also, nowhere in any operative portion of the Complaint is there any allegation or  
20 request that the Court enforce the terms of the Compact with respect to RSTF money.

21 B. Plaintiff does not seek compensatory damages

22 As stated, the Plaintiff has dismissed its breach of contract and breach of fiduciary  
23 causes of action, such that no request for compensatory damages exists.

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1 C. The Complaint does not seek a judicial determination of the Tribe's status

2 The Commission falsely asserts that Plaintiff seeks relief in the form of a judicial  
3 determination of the Tribe's status. (Defendant's P/A's pg. 2, lines 13-15). It then argues, that  
4 "[t]ribal status is governed by federal law." ( Ibid. at line 15). However, the Commission's  
5 premise is flawed.

6 No where in the Complaint is there any claim or request that the Court make a  
7 determination of the Tribe's status. In fact the opposite is alleged. What Plaintiff is asking the  
8 Court to do, is to accept the undisputed fact that the Tribe is not organized, and make a judicial  
9 determination of the Commission's duty to distribute RSTF funds to the Tribe, given that  
10 undisputed fact. Plaintiff contends that the Commission has a duty to continue paying out  
11 RSTF money to the Tribe, as it had been doing previously, despite the fact that the Tribe is  
12 presently "unorganized". It is undisputed that the Tribe is a federally recognized Tribe,  
13 because it is on the "Federally Recognized Indian Tribe List Act of 1994", and no federal court  
14 has ruled that the Tribe is no longer federally recognized. Indeed, the Bureau of Indian Affairs  
15 ("BIA") has never made that determination, and has never withdrawn its determination that  
16 Sylvia Burley is the Tribe's representative.

17 Nowhere in the Compact is there any requirement that a Non-Compact Tribe be  
18 "organized" in order to qualify for RSTF money. In fact, the Commission previously recognized  
19 this when it paid RSTF money to the Tribe up to 2005, during the Tribal leadership dispute.

20 In short, the Complaint only asks the Court to make a judicial determination on whether  
21 the Commission has a continuing duty to distribute RSTF money to the Tribe, even though the  
22 Tribe is presently "unorganized". The Plaintiff is not asking the Court to adjudicate its tribal  
23 status, so as to satisfy the Commission's erroneous concerns about continued payment of  
24 these funds.

1 These points are set forth in more detail in Plaintiff's Opposition to Defendant's Motion  
2 to Dismiss, which Plaintiff incorporates herein by reference.

3 D. The Complaint does not ask the Court to resolve any tribal leadership dispute or  
4 seek a judicial determination of any competing claims to the RSTF money

5 The Commission argues that federal jurisdiction still exists, because the Complaint  
6 purportedly seeks a determination of who is authorized to act on behalf of the Miwok Tribe.  
7 (Defendant's P/A's, pg. 2, lines 9-14). This contention is frivolous at best.

8 Again, there is no allegation in the Complaint asking the Court to resolve a tribal  
9 leadership dispute, so that the Commission can pay the RSTF money to the proper  
10 "representative". The facts are what they are. The Tribe is presently unorganized, due, in part,  
11 because of a tribal leadership dispute. The Plaintiff's position is that that fact alone does not  
12 excuse the Commission from distributing the RSTF money to the Tribe, as it has been doing  
13 so in the past. Nothing has changed. However, the Commission has now suddenly changed  
14 its mind, and stopped payment, which Plaintiff contends it cannot do, since the Compact  
15 provides that the Commission has "no discretion" on how the RSTF money should be  
16 distributed. Indeed, the Commission has already admitted that it cannot get involved in any  
17 tribal leadership dispute, or make its decisions on distribution dependent upon the status of the  
18 Tribe's government. (See Declaration of Gary Qualset, attached to Defendant's motion to  
19 Dismiss).

20 **III.**

21 **CABAZON DOES NOT COMPEL REMOVAL**

22 The Commission argues that this Court nevertheless has subject matter jurisdiction,  
23 because of the case of Cabazon Band of Mission Indians v. Wilson (9<sup>th</sup> Cir. 1997) 124 F.3d  
24 1050. Reliance on Cabazon is, however, misplaced.

1 In Cabazon, the Court of Appeals noted that the jurisdictional issue was limited to the  
 2 Tribe's "action to enforce the Compacts". It stated:

3 Initially, we must determine whether the district court had subject matter  
 4 jurisdiction over the Bands' action to enforce the Compacts and to require  
 the State to pay over to the Bands the license fees...

5 124 F.3d at 1055. In contrast, the Plaintiff here is not seeking to enforce the Compact.  
 6 Rather, the Miwok Tribe here is simply seeking a judicial determination, by way of declaratory  
 7 relief, on the Commission's duty to distribute RSTF money to an "unorganized", non-compact  
 8 Tribe.

9 In addition, in Cabazon, the Plaintiff Tribe was seeking to enforce a specific contract  
 10 provision within the very Compact itself. That provision specifically provided that the Cabazon  
 11 Tribe was required to sue in the U.S. District Court to obtain a judicial determination of whether  
 12 certain horse racing licensing fees the State collected from the State's horse racing  
 13 associations who operated on Tribal facilities, should be turned over to the Tribes. 124 F.3d at  
 14 1055. It was, therefore, a "contract within the Compact." Because of this, the Court in  
 15 Cabazon concluded that the State's obligations originated in the Compact, and because the  
 16 Compact was a "creation of federal law", the Tribe's suit to enforce the Compact arose under  
 17 federal law. It stated:

18 ...[The Bands'] claim is not based on a contract that stands independent  
 19 of the Compact. Rather, it is based on an agreement contained within the  
 20 Compacts...The State's obligation to the Bands thus originates in the  
 21 Compacts. The Compacts quite clearly are a creation of federal law....  
 We conclude that the Bands' claim to enforce the Compacts arises under  
 federal law and thus that we have jurisdiction....

22 124 F.3d at 1055-56. In contrast, Plaintiff here does not seek to enforce an agreement within  
 23 the Compact. Indeed, there is no provision in the Compact that requires Non-Compact Tribes,  
 24 like the Miwok Tribe, to sue in the U.S. District Court to resolve a dispute over the  
 25 Commission's duty to pay RSTF money to Non-Compact Tribes. Moreover, unlike what the

1 Cabazon Tribe did in their case, the Miwok Tribe here seeks declaratory relief as to the  
 2 Commission's duty under Cal. Gov. Code Section 12012.75, which is not an agreement or  
 3 provision that originates in the Compact. Indeed, it is not referenced in the Compact. The  
 4 Miwok Tribe here does not seek to enforce the Compact or any of its terms.

5 In addition, the Compacts at issue in Cabazon predated the present 1999 Compact by  
 6 10 years (1990 and 1991), and thus have no application to the issues in this case.

7 The Commission's further reliance on Rincon Band of Mission Indians v.  
 8 Schwartzenegger, attached to its opposition papers, is equally misplaced. In Rincon, the issue  
 9 was whether five (5) other Tribes the Plaintiff Rincon Tribe failed to join, were necessary and  
 10 indispensable parties. The Decision in that case made no ruling that the Compact gave rise to  
 11 subject matter jurisdiction for the issues presented there.

#### 12 IV.

#### 13 **THE COMMISSION'S OBLIGATION TO DISTRIBUTE RSTF MONEY TO NON-COMPACT 14 TRIBES IS GROUNDED ON STATE LAW, NOT FEDERAL LAW**

15 As shown, the Plaintiff here seeks a judicial determination of the Commission's duty to  
 16 distribute RSTF money to Non-Compact Tribes, based on Cal. Gov. Code Section 12012.75, a  
 17 State statute specifically enacted to identify the Commission's duties with respect to RSTF  
 18 money. Accordingly, no federal question is in dispute.

#### 19 V.

#### 20 **THE PLAINTIFF IS NOT "STUCK" IN FEDERAL COURT, 21 BECAUSE OF THE INITIAL BREACH OF CONTRACT CLAIM**

22 The Commission argues that the Plaintiff's dismissal of its breach of contract claim was  
 23 ineffective, because "[f]ederal court jurisdiction...is based on the complaint at the time of the  
 24 removal, not as subsequently amended," citing Libhart v. Santa Monica Dairy Co. (9<sup>th</sup> Cir.  
 25 1979) 592 F.2d 1062, 1065. This is not the law, and the Commission has misquoted the  
Libhart case.

1 First of all, it is not “federal court jurisdiction”, but rather “federal removal jurisdiction”  
 2 that is the proper phrase. The Court in Libhart merely quoted the law, and said:

3 In determining the existence of removal jurisdiction based upon a federal  
 4 question, we must look to the complaint as of the time the removal petition  
 was filed.” (citation omitted).

5 592 F.2d at 1065.

6 Second, the U.S. District Court has the discretion as to whether to continue to exercise  
 7 its jurisdiction over a case with only State law claims, after the Plaintiff eliminates a federal  
 8 question by voluntary dismissal of part of its case. Indeed, “when the federal claims have been  
 9 dropped out of the lawsuit in its early stages and only state law claims remain, it may be an  
 10 abuse of discretion for the federal district court to retain the case.” Federal Civil Procedure  
 11 Before Trial, California Rutter Group Practice Guide, Section 2:1069, page 2D-198.13 (2007);  
 12 see Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 349, 108 S.Ct. 614, 618-619; Wren v.  
 13 Sletten Constr. Co. (9<sup>th</sup> Cir. 1981) 654 F.2d 529, 536. While the federal court may either  
 14 dismiss or remand the remaining State law claims, after early dismissal of the federal claims,  
 15 remand is “preferable”, because it avoids any statute of limitations problem and the time and  
 16 expense of filing new pleadings in State court. Carnegie-Mellon Univ., *supra* at 351.

17 Third, if it is discovered at any time in the litigation that removal jurisdiction is lacking (no  
 18 diversity or federal question at time of removal), the removed case must be remanded to State  
 19 court rather than dismissed. See Albingia Versicherungs A.G. v. Schenker Int'l, Inc. (9<sup>th</sup> Cir.  
 20 2003) 344 F.3d 931, 936; 28 U.S.C. Section 1447(c). Here, Plaintiff voluntarily dismissed the  
 21 breach of contract and breach of fiduciary duty claims as a precaution. As pled even under  
 22 those claims, no federal question existed, because, as the Commission concedes, the  
 23 Compact does not provide for breach of contract “compensatory damages”. Only equitable  
 24 relief is permitted. Thus, even as originally pled, no federal question was in dispute.



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**VI.**

**CONCLUSION**

For the foregoing reasons, and for the reasons expressed in Plaintiff's Motion to Remand, the case should be remanded back to State Court.

Dated: February 27, 2008

s/ Manuel Corrales, Jr.  
Manuel Corrales, Jr., Esq.  
Attorney for Plaintiff  
California Valley Miwok Tribe

**CERTIFICATE OF SERVICE**

**Case Name:** California Valley Miwok Tribe v. California Gambling Control Commission

**Court:** United States District Court, Southern District of California  
Case No. 08-CV-0120 BEN AJB

I Declare: On **February 27, 2008**, I electronically filed the following documents:

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION

**ELECTRONIC MAIL NOTICE LIST**

I have caused the above-mentioned document(\*s) to be electronically served on the following person(s) who are currently on the list to receive e-mail notices for this case:

[Peter.Kaufman@doj.ca.gov](mailto:Peter.Kaufman@doj.ca.gov)

**MANUAL NOTICE LIST**

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct, and that this declaration was executed on **February 27, 2008**, at San Diego, California.

Manuel Corrales, Jr.  
Declarant

s/ Manuel Corrales, Jr.  
Manuel Corrales, Jr. Esq.

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION

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